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No. 88-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PULLMAN-STANDARD, INC., etc.,

Petitioner,

v.

LOUIS SWINT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Louis Swint, et al., respectfully request that this Court deny the petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Discrimination in the Selection of Supervisors

(1) Petitioner asserts that the court of appeals erred in finding that the employer's method of selecting foremen had an unlawful disparate impact in violation of Title VII. (Pet. 14-20) The threshold difficulty with this contention is that for procedural, arguably jurisdictional reasons, it cannot be raised on appeal at this point in the litigation.

The Eleventh Circuit held that these promotion practices violated Title VII, but it did so not in its recent 1988 opinion, but in its earlier 1980 opinion. (Pet. App. 222a-227a). Petitioner could have sought review of that decision nine years ago, and it did, but in vain. Petitioner's 1980 certiorari petition expressly asked this Court to reconsider this aspect of the 1980 Eleventh Circuit

decision,[1] but the Court limited its grant of certiorari to questions related to the disputed seniority system. Pullman-Standard v. Swint, 451 U.S. 906 (1981) (Pet. App. 232a).

Although the Eleventh Circuit's 1988 opinion also addressed one aspect of this issue, it did so subject to a constraint equally applicable to this Court. The foreman promotion issue was before the court of appeals in 1988 only because, and to the extent that, a single subsidiary question had been certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The question so certified was whether

> there has been a finding of intentional discrimination in the selection of supervisory

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[1] The third and fourth questions in that petition dealt with the selection of supervisors. Petition for Writ of Certiorari, No. 80-1190, pp. ii-iii; 27-30.

> personnel ... and ... the defendant is subject to potential liability at a Phase II hearing with respect to such claims.

(Pet. App. 284a) (emphasis added) (See also id. at 282a-283a).[2] Petitioner's central contention in the 1988 appeal was that the 1980 opinion fell short of the finding of intentional discrimination that, petitioner contended, was necessary to warrant proceeding to a Phase II hearing regarding the amount of petitioner's liability. The Eleventh Circuit dismissed this argument as irrelevant, explaining that its 1980 decision had rested on a finding of unlawful discriminatory impact, not

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[2] The district court order to which this question apparently referred had ruled that the 1980 circuit opinion constituted a sufficient finding of intentional discrimination. (Pet. App. 282a).

unlawful discriminatory intent.[3] Under section 1292(b) the only issue regarding supervisors over which the Eleventh Circuit had jurisdiction in the 1988 certified appeal was whether the 1980 opinion lacked an allegedly essential finding of discriminatory intent; petitioner does not here contest that aspect of the 1988 opinion, and does not ask this Court to review it.

The 1988 opinion does go on to explain the holding of the 1980 decision,

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[3] Pet. App. 51a-52a:

> "[I]n the company's view, the Swint VI holding does not constitute the required finding of intentional discrimination.... It is true ... that Swint [VI] does not include a finding that Pullman intentionally discriminated in its selection of supervisors. That observation, however, is irrelevant: the plaintiffs here clearly proceeded on a disparate impact, rather than disparate treatment, theory, and thus did not need to prove discriminatory intent."

and to note the different standard of proof in a disparate impact case and a disparate treatment case. But this commentary does not and could not present a distinct issue, outside the scope of section 1292(b), that could be reviewed by this Court. This Court reviews holdings, not reasons, and the dispositive holding in the certified appeal was that the 1980 opinion did not lack an essential finding of discriminatory intent, a holding with which petitioner does not now disagree.

We do not suggest that petitioner is forever precluded from bringing to this Court the issues raised in its petition, but only that it cannot do so at this interlocutory point in the litigation. Once a final judgment has been entered on the foreman issue, petitioner could seek review by this Court and ask it to reach back and correct any legal error

underlying that judgment. Mercer v. Theriot, 377 U.S. 152, 153-54 (1964). This Court could do so despite having denied certiorari in 1980. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n. 1 (1973). But at this point in the litigation it would be inconsistent with the constraints of section 1292(b), and with the policy against interlocutory appeals, to convert an appeal of a narrowly drawn certified question into a plenary interlocutory review of any and all aspects of the claim.[4]

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[4] For the same reason petitioner cannot at this point in time seek review of its objection that certain aspects of the Eleventh Circuit's 1980 opinion, which this Court previously declined to review, constituted improper appellate factfinding. (Pet. 26-28). Petitioner objects that in 1988 the Eleventh Circuit improperly "refused to reconsider" its 1980 decision. (Pet. 26). In light of the limited scope of the section 1292(b) certified question, that refusal was for procedural reasons entirely proper.

(2) Petitioner suggests that the 1980 and 1988 Eleventh Circuit opinions failed to anticipate the changes in the law brought about by Watson v. Fort Worth Bank & Trust Co., 101 L.Ed.2d 827 (1988), and, presumably, Wards Cove Packing Co. v. Atonio, 104 L.Ed.2d 733 (1989). There is dictum in the 1988 opinion placing on an employer in a disparate impact case not only the burden of production, but also the burden of proof regarding the business justification for practices with a disparate impact. (Pet. 18-20). (See Pet. App. 53a). But in this case the actual 1980 finding of a Title VII violation was, in the view of the 1988 appellate panel, premised on a holding that petitioner had failed to meet its burden of production. The court of appeals in its 1988 opinion explained that the 1980 opinion was grounded on a

determination that "Pullman had offered no legally acceptable evidence that its subjective selection procedure was a business necessity." (Pet. App. 53a).

Petitioner asserts that the Eleventh Circuit held "in effect" that a plaintiff could establish a prima facie case of disparate impact without having to compare an employer's selection rate with the composition of the pool of qualified individuals. (Pet. 14-17). The Eleventh Circuit's 1988 opinion, however, expressly emphasized the existence of just such a requirement:

> We recognize fully that Johnson [v. Transportation Agency, 480 U.S. 616 (1987)] and Hazelwood [School District v. United States, 433 U.S. 299 (1977)] require plaintiffs to recognize the basic qualifications for a position and exclude from their statistical pools persons who are obviously unqualified.

(Pet. App. 56a n. 50). Petitioner suggests that the appellate court, in

finding a prima facie case of disparate impact, improperly overrode the determinations of the district court (Pet. 15); in fact, the district court too found such a prima facie case. (Pet. App. 171a, 222a).

Disputes regarding whether evidence of disparate impact is sufficiently refined raise essentially fact-specific questions about the practices and business needs of an individual employer.[5] In this case that factual assessment has proved particularly difficult. As the Court of Appeals observed in 1980, there was a "lack of any articulated or defined skills which are necessary to perform capably as a temporary or salaried foreman at

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[5] Dothard v. Rawlinson, 433 U.S. 321, 330-31 (1977). ("If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.")

Pullman-Standard." (Pet. App. 226a). The appellate court noted in its 1976 opinion that there were "no established criteria for selection of new foremen." (Pet. App. 136a).

The factual problems involved in evaluating this record are illustrated by the somewhat different manner in which petitioner has characterized its own practices. In its pending petition the company maintains that "experience in the particular or related department was normally required" for promotion to a foreman position. (Pet. 15). (Emphasis added). But in its 1980 certiorari petition the company adamantly insisted that there was no such requirement:

> Pullman clearly imposed no requirement that a foreman be promoted from within the same department.... [T]he Fifth Circuit apparently misunderstood it did.... [and] then held that Pullman discriminated against blacks in promotions to foremen ... because the

> imaginary requirement that supervisors be promoted from within the same department was not a "business necessity."[6]

It would not be appropriate to grant certiorari to resolve the fact-specific conflict between the company's two certiorari petitions.

II. Scope of the Class

The issue framed by petitioner regarding the scope of the class also appears to be unreviewable at this interlocutory point in the litigation, although it could be raised at a later date. The authority of the appellate courts to address this question is circumscribed by the scope of the specific

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[6] Petition for Writ of Certiorari, No. 80-1190, pp. 28-29 (emphasis added). See also id. at 9 ("The evidence and the District Court's own findings showed that Pullman did not restrict promotions to temporary foreman to intradepartmental ones"), id. ("undisputed evidence shows [that experience in the same department] was never a requisite to such promotions").

question certified under section 1291(b). That question was whether

> the named plaintiffs [have] standing to represent class members claiming discriminatory initial job assignments during the period from July 17, 1969 to August 16, 1974.

(Pet. App. 285a) (Emphasis added).[7] The question so certified is now clearly moot. The district court held that assignment discrimination ended by January 31, 1969, and the Eleventh Circuit upheld that finding. (Pet. App. 41a) The only assignment discrimination claims still

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[7] Although section 1292(b) provides for certification of an order for an interlocutory appeal, the district court's certification in this regard makes no reference to the issue having been resolved by any prior district court order, but simply certifies the quoted question. In requesting leave to appeal by the Eleventh Circuit, petitioner attributed to the prior court of appeals decision, not to the district court, the decision to sustain this aspect of the class. Petition of Pullman-Standard for Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), No. 86-2143 (11th Cir), pp. 27-31.

being litigated in this case involve assignments occurring prior to February 1, 1969.

Petitioner contends that the class represented by the named plaintiff cannot include employees who were subject to "post-Act discrimination in ... assignments." (Pet. 23), i.e. employees subjected to that discrimination after July 1, 1965. But the period from July 1965 through January 1969, the era of the proven actionable assignment discrimination in this case, is outside the scope of the certified section 1292(b) question. Similarly, petitioner argues that the named plaintiffs cannot litigate class claims of discrimination in the selection of supervisors; but that too is clearly outside the scope of the certified question. Again, as we noted above, there are issues which petitioner can raise

after final judgment. In both General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 153 (1982), and East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 400 (1977), the appeal regarding the scope of the plaintiff class was entertained only after the entry of final judgment on the merits of those claims. "[O]rders granting class certification are inherently interlocutory," Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978), and are "subject to effective review after final judgment." Id., 437 U.S. at 469.

The decision of the appellate court approving the scope of the class in this case reflected not an unthinking "'across-the-board' approach to Title VII class actions" (Pet. 21), but a carefully reasoned analysis of the claims of the named plaintiffs and the putative class

members. The Eleventh Circuit correctly noted that

> [f]rom the start, the plaintiffs' basic complaint has been that Pullman prevented black employees from moving into its higher-level positions through a combination of discriminatory initial assignments and a departmental seniority system. At the time of certification, this claim was legally identical to that of every other member of the class.

(Pet. App. 39a-40a). There were from the outset of this litigation two questions of fact common to the named plaintiffs and all of the putative class members: (1) Did the company engage in a pattern and practice of assigning newly hired black workers to less desirable departments? and (2) Was the effect of such discrimination in assignments unlawfully perpetuated by the plant seniority system? See Teamsters v. United States, 431 U.S. 324, 343-56

(1977).[8] The named plaintiffs could not prevail without demonstrating that they had been given initial assignments on the basis of race; they undertook to do so, as is normal in a race discrimination case, by attempting to show that the company engaged in a longstanding general practice of discrimination in assignments.

This case was initially certified in 1974, without objection, to include a class of all black workers employed at the plant since 1965.[9] (Pet. App. 9a) The district court initially held that there had been relatively little assignment

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[8] The district court noted in 1974 that the class issues included, "Does the system of departmental seniority ... perpetuate the effects of past discrimination in the assignment of black employees among the various departments?" (Pet. App. 66a).

[9] The class action encompassed all claims arising within one year of the earliest Title VII charge. (Pet. App. 20a). The earliest such charge was filed in 1966.

discrimination even prior to 1965. (Pet. App. 74a). The Fifth Circuit in 1976 vacated that holding and remanded the issue for further proceedings. (Pet. App. 128a). On remand in 1977 the district court found that at least until 1965 there had indeed been a general policy of discrimination in assignment. (Pet. App. 160a-161a). Thereafter litigation continued regarding when that discriminatory practice ended, and regarding whether the effects of that discrimination were unlawfully perpetuated by the seniority system.[10]

At the point in time when this case was filed, and the class was certified, respondents' claim that petitioner engaged in a general practice of assignment

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[10] The validity of the seniority system is the subject of our own petition. Swint v. Pullman-Standard Co., No. 88-1602.

discrimination, and perpetuated the effects of that discrimination through its seniority system, presented a paradigm of the type of claim for which a Rule 23(b)(2) class action is appropriate.[11] If the individual claims of the named plaintiffs had thereafter failed, that would not have precluded them from continuing to represent the certified class. Franks v. Bowman Transportation Co., 424 U.S. 747, 753-57 (1976). A fortiori respondents are not precluded from continuing to represent the class simply because they have now succeeded in showing that they were the victims of assignment discrimination.

Petitioner objects that the named plaintiffs do not have "a personal stake"

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11 Class certification is appropriate if, inter alia "[t]he party opposing the class has acted ... on grounds generally applicable to the class." F.R.Civ. Pro., Rule 23(b)(2).

in whether there was assignment discrimination after 1965. (Pet. 21). But this is an attack, not on the decision of the Eleventh Circuit, but on Rule 23 itself. A class representative virtually never has a "personal stake" in whether individual class members personally collect a money judgment or receive the benefits of an injunctive decree. As this Court explained in Franks, even after the claims of a class representative have been resolved and he or she no longer has any "personal stake in the outcome" of the litigation, class certification confers on the named plaintiffs authority to continue to represent the interests of the class members whose claims remain in dispute. Franks v. Bowman Transportation Co., 424 U.S. at 752-57.

III. The Statute of Limitations

Petitioner argues that the statute of limitations for a section 1981 claim arising in Alabama should be one year (Pet. 28-29), rather than the six year period adopted by the court below. (Pet App. 29a-35a). Petitioner does not contend that the claims in this case are time barred, but seeks only to shorten the period for which it faces back pay liability. The practical significance of this issue is in the instant case somewhat limited. The Court of Appeals held that the limitations period for respondents' Title VII claims, which encompass all the claims also asserted under section 1981, commenced on September 28, 1966, (Pet. App. 19a-28a), a holding which petitioner does not challenge. Utilization of a six year limitation period for the section 1981 claim in fact extends the total

period of back pay liability less than a year, since most of that six year period overlaps the years when back pay would in any event be available under Title VII.

Petitioner urges that Owens v. Okure, 109 S.Ct. 573 (1989), indicates that the one-year Alabama residual statute of limitations, rather than a six year limitations period, should now be applied in section 1981 actions arising in that state. That contention, even if correct, would not control the rule of limitations to be applied in this case.

Rule 8(c), F.R.Civ. Pro., requires a defendant to "set forth affirmatively" in its answer any "statute of limitations" defense. In its original 1971 answer, petitioner stated:

> This defendant avers that the applicable statutes of limitations, Alabama Code, Title 7, Sections 21 and 22, bar all claims made in the complaint, based on 42 U.S.C.A., Section 1981, arising more than six

> years prior to the filing of the complaint.

(Pet. App. 35a n. 35) (Emphasis added). Petitioner never sought to amend its answer, and did not assert the existence of any shorter limitations period until this litigation had been pending for over a decade.[12] The Eleventh Circuit properly recognized that such conduct, at least ordinarily, constitutes "a waiver of the shorter statute." (Pet. App. 35a).[13]

Even if it were not now too late for petitioner to disavow its longstanding

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[12] The Court of Appeals noted that "[t]here is a strategic reason why a class action defendant might waive objections to the size or inclusiveness of a class: a favorable decision against an all-inclusive class of plaintiffs will in many instances bar further suits." (Pet. App. 21a n. 26).

[13] All circuit courts agree that a failure to plead a statute of limitations waives that affirmative defense under Rule 8. 5 Wright & Miller, Federal Practice and Procedure, § 1278; 2A Moore's Federal Practice, ¶ 8.27[4].

position that section 1981 claims are subject to a six year period of limitations, the major issues raised by Owens in this case would concern retroactivity. During the 18 years since this case was filed the law regarding the section 1981 period of limitations has reversed field several times. At the time this case was first filed, the (then) Fifth Circuit law was that the period of limitations for a section 1981 claim was ten years, and that that limitations period itself was tolled by the filing of a Title VII charge.[14] The district judge in this case applied that tolling rule in his 1974 order specifying the period during which back pay claims on behalf of the class were at issue.[15] In 1975

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[14] Boudreaux v. Baton Rouge Marine Contr. Co., 437 F.2d 1011, 1017 n. 16 (5th Cir. 1971).

[15] Pet. App. 20a.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), overturned the circuit court's tolling rule. For a time the Fifth Circuit then held that section 1981 claims should be governed by the Alabama limitations period for contract actions; that line of decisions was overturned by Wilson v. Garcia, 471 U.S. 261 (1985) (§ 1983) and Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (§ 1981). The Eleventh Circuit thereafter construed Wilson to require the use of the six year Alabama rule for trespass to person or liberty. Jones v. Preuit & Mauldin, 763 F.2d 1250, 1256 (11th Cir. 1985). Now, petitioner maintains, Jones has in turn been overruled by Owens. Which of this succession of supervening decisions should and should not be applied retroactively to the unique and complex circumstances of this litigation is a fact specific

question peculiar to this case. It is not a question which warrants review by this Court or which, after 18 years of litigation, respondents should be required to litigate yet again.

CONCLUSION

This case, possibly more than any employment discrimination suit of our era, has been buffeted and prolonged by seemingly incessant changes in the law. This case has been tried 4 times, and has to date given rise to 11 opinions. The foreman selection issue was originally tried 15 years ago, and the finding of liability was made 9 years ago. The district court first found 15 years ago that there had been a practice of pre- and post-Act assignment discrimination. (Pet. App. 77a). To date not a single penny of back pay has been ordered to implement those liability determinations, and Stage

II proceedings to calculate the back pay awards have not even begun. After 18 years of litigation, many of the original class members have died. (Pet. App. 3a). It would be unconscionable to now require that this entire process begin anew.[16]

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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16 See Franks v. Bowman Transportation Co., 424 U.S. at 757 n. 9 ("to 'split up' the underlying case and require that the individual class members begin anew ... would be destructive of the ends of judicial economy as well as postpone indefinitely relief which under the law may already be long overdue.")

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